INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	14
Appendix A	15
Appendix B	16

CITATIONS

Cases:

Bangor Punta Corporation v. *Chris-Craft Industries, Inc.*, CCH Fed. Sec. L. Rep. ¶ 93,816 (C.A. 2, No. 72–1120)	1, 6
Chris-Craft Industries, Inc. v. *Bangor Punta Corporation*, 426 F. 2d 569	4
Chris-Craft Industries, Inc. v. *Piper Aircraft Corporation*, CCH Fed. Sec. L. Rep. ¶93,816 (C.A. 2, No. 72–1064)	1, 5–6
Hecht Co. v. *Bowles*, 321 U.S. 321	9
J. I. Case Co. v. *Borak*, 377 U.S. 426	12
Mitchell v. *Pidcock*, 299 F. 2d 281	10
Otis & Co. v. *Securities and Exchange Commission*, 106 F. 2d 579	9
Securities and Exchange Commission v. *Advance Growth Capital Corp.*, 470 F. 2d 40	8
Securities and Exchange Commission v. *Bangor Punta Corporation*, CCH Fed. Sec. L. Rep. ¶93,816 (C.A. 2, Nos. 72–1140 and 72–1053)	6

318-070—73——1

Cases—Continued

	Page
Securities and Exchange Commission v. *Capital Gains Research Bureau*, 375 U.S. 180	11
Securities and Exchange Commission v. *Culpepper*, 270 F. 2d 241	10
Securities and Exchange Commission v. *First American Bank and Trust Co.*, CCH Fed. Sec. L. Rep. ¶94,031 (C.A. 8, Nos. 72–1306 and 72–1313)	8
Securities and Exchange Commission v. *Keller Corporation*, 323 F. 2d 397	8, 9
Securities and Exchange Commission v. *MacElvain*, 299 F. Supp. 1352, affirmed, 417 F. 2d 1134, certiorari denied, 397 U.S. 972	10
Securities and Exchange Commission v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082	8, 10
Securities and Exchange Commission v. *Okin*, 139 F. 2d 87	9
Securities and Exchange Commission v. *Radio Hill Mines Co., Ltd.*, CCH Fed. Sec. L. Rep. ¶ 93,974 (S.D.N.Y.)	13
Securities and Exchange Commission v. *Universal Service Ass'n*, 106 F. 2d 232, certiorari denied, 308 U.S. 622	9
Tanzer v. *Huffines*, 408 F. 2d 42	8
United States v. *Borden Co.*, 347 U.S. 514	12
United States v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316	9, 10
United States v. *Parke, Davis & Co.*, 362 U.S. 29	10
United States v. *W. T. Grant Co.*, 345 U.S. 629	10
Walling v. *Helmerich & Payne, Inc.*, 323 U.S. 37	9

Statutes and rules:

	Page
Securities Act of 1933, as amended, 15 U.S.C. 77a, *et seq.*):	
Section 17(a), 15 U.S.C. 77q(a)	5
Section 20(b), 15 U.S.C. 77t(b)	2
Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a, *et seq.*:	
Section 10(b), 15 U.S.C. 78j(b)	5
Section 21(e), 15 U.S.C. 78u(e)	3
Rules under the Securities Exchange Act of 1934 (Rule 10b–5, 17 C.F.R. 240.10(b)–5)	5
Miscellaneous:	
Mathews, *SEC Civil Injunctive Actions*, 5 Review of Securities Regulation, Part II (1972)	13

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

BANGOR PUNTA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the part of the judgment of the United States Court of Appeals for the Second Circuit that affirmed the denial of injunctive relief sought by the Commission.

OPINIONS BELOW

The opinion of the court of appeals is set forth at pages H1—H124 of the joint appendices in Nos. 73-152—73-154[1] and is reported at ['72-'73 Decisions] CCH Fed. Sec. L. Rep. ¶ 93,816. The opinion of the district court is reported at 331 F. Supp. 1154 (J. App. C1-C18).

[1] No. 73-152, *The First Boston Corporation* v. *Chris-Craft Industries*; No. 73-153, *Bangor Punta Corporation, et al.* v. *Chris-Craft Industries*; No. 73-154, *Howard Piper, et al.* v. *Chris-Craft Industries*. The joint appendices are hereafter referred to as J. App.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on March 16, 1973, and a timely petition for rehearing and suggestion of rehearing *en banc* was denied on May 8, 1973 (App. B, *infra*). On August 6, 1973, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit by the Securities and Exchange Commission to enjoin violations of the antifraud provisions of the federal securities laws, the Commission is entitled to an injunction upon showing a serious violation of those laws, unless the defendant shows exceptional circumstances exist that would make an injunction inappropriate in the particular case.

STATUTES INVOLVED

Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b), provides in pertinent part:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(e), provides in pertinent part:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

STATEMENT

The Securities and Exchange Commission seeks review of a decision of the court of appeals that affirmed the denial of an injunction against a defendant found to have violated the antifraud provisions of the federal securities laws.

The Commission brought this action in the United States District Court for the Southern District of New York to enjoin respondent Bangor Punta Corporation ("Bangor Punta") from violating antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 in connection with a 1969 contest between Bangor Punta and Chris-Craft Industries, Inc. ("Chris-Craft") for control of Piper Aircraft Corporation ("Piper"). Earlier in that contest, Bangor Punta announced a proposed offer for Piper stock through an exchange of its own stock when no registration statement was in effect for that exchange. The Commission sued and Bangor Punta con-

sented to an injunction which included a prohibition against implementing any exchange offers without complying with the registration provisions of the federal securities laws (J. App. H85). This same attempted stock exchange was subsequently held, in a private suit between Bangor Punta and Chris-Craft, to have violated the statutory registration provisions. That violation, the court stated, created "a danger that substantial numbers of investors were misled" and meant that "the public did not receive the detailed information it would have received" had Bangor Punta complied with the statute. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corporation,* 426 F. 2d 569, 575 (C.A. 2).

On May 29, 1969, three days after the consent injunction was entered, Bangor Punta filed with the Commission a registration statement and prospectus for an offering of its securities in exchange for Piper stock. The prospectus showed that the Bangor and Aroostook Railroad, owned by Bangor Punta, was carried on its books at $18,400,000, based on a 1965 market appraisal. The statement did not disclose that a sale of this interest was then being negotiated at between $5 million and $7 million.[2]

---

[2] Eight days before the filing of the registration statement, Bangor Punta's Board of Directors was told of an offer to pay $5 million for the railroad, and directed its representative to attempt to negotiate a sale at $7 million. The registration statement became effective on July 18, 1969: Bangor Punta obtained 51 percent of the outstanding Piper shares by September 5, 1969; the railroad was sold for $5 million on October 2, 1969 (J. App. C2, C10–C11; H18, H43–H45). This sale resulted in a $13,800,000 extraordinary loss, contributing to an $8,566,964 loss of net income for 1969

The Commission's complaint in the present action charged that Bangor Punta's registration statement and prospectus were false and misleading because they failed to disclose these negotiations; such disclosure would have afforded information relevant to the value of Bangor Punta stock. The district court agreed that Bangor Punta's registration statement contained misleading omissions of material fact in violation of antifraud provisions of the securities laws.[3] It nevertheless denied the Commission's request for an injunction, since it found that the omissions were "mere negligence" and that the defendant was "unintentionally in error." It concluded that the Commission had "failed to carry its burden to establish" that the defendant and its officials "have a propensity or natural inclination to violate the securities law" (J. App. C17). The court did direct Bangor Punta, however, to make an offer of rescission to Piper shareholders who had accepted the Bangor Punta exchange offer (J. App. C16).

A divided court of appeals affirmed the district court's denial of the injunction.[4] The court held that

---

(J. App. H45). It represented a loss of $4.32 per share, an amount far exceeding the company's net income for any of the prior five years (J. App. C15).

[3] See Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10(b)-5, 17 C.F.R. 240.10b-5, promulgated thereunder.

[4] The court of appeals heard and decided the Commission's appeal together with appeals in two related private actions, growing out of the same contest for corporate control, *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation*, C.A. 2,

the failure to disclose "clearly was unreasonable" and demonstrated "reckless disregard for the import of [defendant's] activities," so that the district judge's refusal to award damages in the related private actions was erroneous (J. App. H48, H68–H69). The court ruled, however, that the district court had not abused its discretion in denying the injunction (J. App. H96–H100). It stated that "[t]he SEC has, through our decision in the companion cases now largely achieved its commendable purpose" (J. App. H100). Judge Mansfield, in his concurring opinion, stated (J. App. H123–H124) that he was "convinced that a judgment which (1) awards compensatory damages to CCI, (2) bars BPC from voting its illegally acquired Piper shares, and (3) awards rescission to former Piper stockholders who exchanged their shares in response to BPC's tender offer, amply protects the public interest and insures against any reasonable likelihood that BPC will engage in similar conduct in the future."

In his dissenting opinion on the injunction issue, Judge Timbers, characterizing Bangor Punta's omis-

---

Docket No. 72–1064, and *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.*, C.A. 2, Docket No. 72–1120 and with a cross-appeal by Bangor Punta with respect to certain ancillary relief that was granted in the Commission's suit, C.A. 2, Docket No. 72–1140. The consolidated opinion in these cases was rendered by a panel of three judges, composed of Circuit Judges Mansfield and Timbers and Judge Gurfein of the United States District Court for the Southern District of New York. While Judge Timbers (J. App. H6–H95) wrote the opinion of the court on most aspects of the case, Judge Gurfein's opinion (J. App. H95–H100) is the court's opinion on this aspect of the case. Judge Timbers dissented on this aspect of the decision (J. App. H78–H89).

sions from its registration statement and prospectus as "violations of the securities laws of the most flagrant character" (J. App. H84), concluded that the district court had applied an erroneous standard in requiring the Commission to show that the defendant had a "propensity or natural inclination" to violate the securities laws (J. App. H79–H80). He also stated (J. App. H82) that "the district court totally failed to recognize that an injunction in an SEC enforcement proceeding is sought to protect public rather than private interests." Finally, he concluded (J. App. H89) that the majority decision denying injunctive relief "will cause mischief in the enforcement of the federal securities laws," because it "undercuts the strong policy of this Court of encouraging vigorous enforcement of the securities laws," and will have an "impact beyond this Circuit, since other courts look to us for guidance in this area." He stated (*ibid.*):

> In my view, no decision during the four decades the federal securities laws have been on the books will more effectively cripple the salutory enforcement program of the Securities and Exchange Commission than today's 2–1 decision by the majority of this panel on this issue.

The court of appeals denied the commission's petition for a rehearing *en banc*, with Judges Hays, Oakes and Timbers dissenting.

REASONS FOR GRANTING THE WRIT

This case presents an important question involving the ability of the Securities and Exchange Commission effectively to protect the public by enforcing the antifraud provisions of the federal securities laws.

A major part of the Commission's enforcement activities is the obtaining of injunctions against such violations. As Judge Timbers stated in his dissenting opinion on this issue, the decision of the court of appeals "undercuts the strong policy of this Court of encouraging vigorous enforcement of the securities laws" and will "effectively cripple the salutory enforcement program of the Securities and Exchange Commission * * *" (J. App. H89).

Prior to the decision of the court of appeals in this case, it was generally accepted that the Commission has made the statutory "proper showing" for injunctive relief [6] when it proves that the defendant has committed a significant violation of the federal securities laws.[7] The

[6] See, *e.g.*, *Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1100 (C.A. 2); *Securities and Exchange Commission* v. *First American Bank and Trust Co.* [current binder], CCH Fed. Sec. L. Rep. ¶ 94,031 at p. 94,153 (C.A. 8, Nos. 72-1306 and 72-1313); *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, 470 F. 2d 40, 53 (C.A. 7); *Securities and Exchange Commission* v. *Keller Corporation*, 323 F. 2d 397, 402 (C.A. 7). See also *Tanzer* v. *Huffines*, 408 F. 2d 42, 43, n. 1 (C.A. 3).

[7] See, *e.g.*, *Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.*, *supra*, 458 F. 2d at 1100; *Securities and Exchange Commission v. First American Bank and Trust Co.*, *supra* [current binder], CCH Fed. Sec. L. Rep. ¶ 94,031 at p. 94,153; *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, *supra*, 470 F. 2d at 53; *Securities and Exchange Commission* v. *Keller Corporation*, *supra*, 323 F. 2d at 402. Cf., *Tanzer* v. *Huffines*, *supra*, 408 F. 2d at 43, n. 1.

This is true even though a defendant has ceased its illegal activities prior to institution of the injunctive action. *Securities and Exchange Commission* v. *Keller Corporation*, *supra*, 323

court of appeals, by upholding the district court's denial of an injunction because the Commission had not shown that the defendant had a "propensity or natural inclination" to violate those laws, has significantly departed from and undercut the previous standard governing the issuance of injunctions in such cases. It has subjected the agency to a requirement that would seriously lessen the availability and hence the effectiveness of Commission injunctions as a major tool for protecting public investors against securities frauds.

The hitherto prevailing rule that an injunction ordinarily should issue when the Commission shows a significant violation of the antifraud provisions reflects the obvious fact that the mere commission of such a violation necessarily creates a significant danger of repetition so that the public is entitled to protection against further offenses by the violator. "[T]he standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief" (*Hecht Co.* v. *Bowles,* 321 U.S. 321, 331).[8] The public would not be adequately protected if

---

F. 2d at 402. See also, *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 327; *Securities and Exchange Commission* v. *Okin*, 139 F. 2d 87, 88 (C.A. 2); *Securities and Exchange Commission* v. *Universal Service Ass'n*, 106 F. 2d 232, 239–240 (C.A. 7), certiorari denied, 308 U.S. 622; and *Otis & Co.* v. *Securities and Exchange Commission*, 106 F. 2d 579, 583–584 (C.A. 6).

[8] This Court has emphasized that a "suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323. The Court there also noted that "it is well settled that once the Government has suc-

the Commission were required to keep such violators under surveillance and to institute another action if it discovers that they have repeated or resumed their illegal activities.[9]

The court of appeals viewed this case as involving only the question whether the district court had abused its discretion in denying an injunction. In affirming the denial it purported to apply the standard announced in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, that the party seeking an injunction must show that "there exists some cognizable danger of recurrent violation." If that standard governs the issuance of injunctions in Commission actions under the

---

cessfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." 366 U.S. at 334 (footnote omitted). Similarly this Court has stated that "[t]he courts have an obligation, once a violation * * * has been established, to protect the public from a continuation of the harmful and unlawful activities." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48.

[9] *Securities and Exchange Commission* v. *Culpepper*, 270 F. 2d 241, 250 (C.A. 2). See also *Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.*, *supra*, 458 F. 2d at 1101; and *Securities and Exchange Commission* v. *MacElvain*, 299 F. Supp. 1352, 1354 (M.D. Ala.), affirmed, 417 F. 2d 1134 (C.A. 5), certiorari denied, 397 U.S. 972.

As the Court of Appeals for the Fifth Circuit noted in an analogous context,

"[I]njunctions should [not] be issued freely, without regard for the facts, simply because it is the Government asking for the injunction * * * [but] the manifest difficulty of the Government's inspecting, investigating, and litigating every complaint of a violation weighs heavily in favor of enforcement by injunction—*after* the court has found an unquestionable violation of the Act."

Mitchell v. *Pidcock*, 299 F. 2d 281, 287 (emphasis in original).

antifraud provisions of the securities laws, the answer, as shown above, is that in this area of the law proof of a significant violation itself establishes a "cognizable danger of recurrent violation" which requires that the public be protected through an injunction.

In this case the violation found was characterized by the majority as reflecting "reckless disregard" by the defendant for the consequences of its own conduct and by the dissent as of "the most flagrant character." Under the prior standard, in such circumstances the Commission would have been entitled to an injunction. Indeed, under the prior standard this case would have been *a fortiori* for the issuance of an injunction, since Bangor Punta had violated the registration provisions of the securities laws shortly before it committed the violations on which the Commission's present suit was based. In upholding the denial of an injunction, the court of appeals thus necessarily has applied and approved a new and significantly weaker standard for protecting the public. In evaluating the significance of the court of appeals' decision, it is, of course, the result reached rather than the language used that controls. Cf. *Securities and Exchange Commission* v. *Capital Gains Research Bureau,* 375 U.S. 180, 185, n. 6.[10]

[10] There this Court noted that the court of appeals had purported to recognize that the federal securities laws are to be construed broadly to effectuate their remedial purposes, but had, nevertheless, by affirming the district court's " 'technical construction of the * * * Act * * * and by requiring proof of 'misstatements,' unsound advice, bribery, or intent to unload 'worthless stock.' * * * read the statute, in effect, as confined by traditional common-law concepts of fraud and deceit."

The court of appeals suggested that one consideration justifying the denial of an injunction was that significant relief had been provided for the victims of Bangor Punta's illegal conduct in the companion private action and by the offer of recision Bangor Punta is required to make. But the relief given in a private suit is not an adequate substitute for an injunction in a government suit. "The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive" (*United States* v. *Borden Co.*, 347 U.S. 514, 518; see *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432). Moreover, the relief the court granted here to the private parties would redress only the past injuries the victims of this particular violation had thereby suffered. It would not protect other members of the public against other violations that Bangor Punta may commit in the future. The other relief the court here awarded is not an adequate substitute for a Commission injunction. Such relief does not come even close to establishing the exceptional circumstances that must justify the denial of injunctive relief in a case where,

as here, there have been serious violations of the anti-fraud provisions of the federal securities laws.

In sum, this decision marks a sharp break with the past standards and practices governing injunctions in Commission enforcement actions. If permitted to stand, it will make it far more difficult for the Commission adequately to protect the public against securities frauds.[11] The effect of this decision by the Second Circuit will be particularly serious because a substantial portion of the Commission's enforcement actions are brought in federal courts in the New York City area, which is the center of the nation's financial and commercial communities. A decision that portends such serious adverse consequences for the nation's public investors warrants review by this Court.

---

[11] One commentator has already suggested that the instant decision has imposed a heavier burden of proof on the Commission. See Mathews, *SEC Civil Injunctive Actions*, 5 Review of Securities Regulation, Part II, pp. 949, 950 (1972).

Similar allegations have been made by defendants in *Securities and Exchange Commission* v. *Radio Hill Mines Co., Ltd.* [current binder] CCH Fed. Sec. L. Rep. ¶93,974 at pp. 93,905–93,906 (S.D.N.Y.); *Securities and Exchange Commission* v. *Allegheny Beverage Corporation* (D. D.C., Civ. No. 932–73); and *Securities and Exchange Commission* v. *Shapiro* (C.A. 2, Doc. No. 72–1927).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,

DAVID FERBER,
Solicitor,

PAUL GONSON,
Assistant General Counsel,

JERRY W. MARKHAM,
Attorney,
Securities and Exchange Commission.

AUGUST 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of March one thousand nine hundred and seventy-three.

Present: Hon. Walter R. Mansfield. Hon. William H. Timbers, Circuit Judges. Hon. Murray I. Gurfein, District Judge.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APELLANT

v.

BANGOR PUNTA CORPORATION, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as modified and that the actions be and they hereby are remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

UNITED STATES COURT HOUSE, SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the 8th day of May, one thousand nine hundred and seventy-three.

Docket No. 72–1053, 72–1064, 72–1120, 72–1140

Present: Hon. Walter R. Mansfield. Hon. William H. Timbers, Hon. Murray I. Gurfein, Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APELLANT

v.

BANGOR PUNTA CORPORATION, DEFENDANT-APPELLANT

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of May, one thousand nine hundred and seventy-three.

Docket No. 72–1053

SECURITIES AND EXCHANGE COMMISSION,
PLAINTIFF-APPELLANT

v.

BANGOR PUNTA CORPORATION,
DEFENDANT-APPELLANT

A petition for a rehearing containing a suggestion that the action be reheared in banc having been filed herein by counsel for the appellant, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judges Hays, Oakes and Timbers dissent.

HENRY J. FRIENDLY,
Chief Judge.

U.S. GOVERNMENT PRINTING OFFICE 1973

FILED
SEP 13
MICHAEL RODAK, J

No. 73-306

IN THE

Supreme Court of the United States

October Term, 1973

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

BANGOR PUNTA CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES V. RYAN
C. KENNETH SHANK, JR.
One Rockefeller Plaza
New York, New York 10020.
Counsel for ~~Petitioners~~ RESPONDENT

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD,
Of Counsel.

September 13, 1973.

INDEX

	PAGE
Questions Presented	1
Statement of the Case	2
Argument	
The District Court's Denial of the Commission's Request for Permanent Injunctive Relief Was a Proper Exercise of Its Discretion	6
Conclusion	11

CITATIONS

CASES:	
James Blackstone Memorial Library Ass'n v. *Gulf, Mobile & Ohio R.R. Co.*, 264 F.2d 445 (7th Cir. 1959), *cert. denied*, 361 U.S. 815 (1959)	7
List v. *Fashion Park, Inc.*, 340 F.2d 457 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1965)	7
SEC v. *Allegheny Beverage Corporation* (D.D.C. Civ. No. 932-73)	10
SEC v. *Culpepper*, 270 F.2d 241 (2d Cir. 1959)	10
SEC v. *Harwyn Industries Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971)	10
SEC v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972)	9-10
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971)	10
United States v. *W. T. Grant Co.*, 345 U.S. 629 (1953)	1, 6, 7, 9
RULES:	
SEC Rule 10b-6, 17 C.F.R. § 240.10b-6	6

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-306

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

BANGOR PUNTA CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

This brief is submitted by respondent Bangor Punta Corporation ("Bangor Punta") in opposition to the petition for a writ of certiorari filed by the Securities and Exchange Commission ("Commission").

Questions Presented

1. Should the standard enunciated by this Court in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953), that there must exist "some cognizable danger of recurrent violation" in order to grant permanent injunctive relief in enforcement actions commenced by governmental agencies, be abandoned?

2. Did the District Court abuse its discretion in this action by denying the Commission's request for permanent injunctive relief where the violation of the securities laws which was found to have occurred involved a unique factual situation and the defendant was found to have acted in complete good faith with no intent to violate the securities laws?

Statement of the Case

On May 29, 1969, Bangor Punta filed with the Commission a registration statement for an exchange offer to the shareholders of Piper Aircraft Corporation ("Piper"). Bangor Punta's registration statement became effective and its exchange offer opened on July 18, 1969. The offer closed on July 29, 1969 with Bangor Punta having acquired 111,628 Piper shares (approximately 7% of its outstanding stock).

At the time of its Piper exchange offer, one of Bangor Punta's assets was its ownership interest in approximately 98% of the outstanding stock of the Bangor and Aroostook Railroad Company ("BAR"). Although Bangor Punta's equity in the underlying net assets of the BAR was approximately $30 million, and it would have been customary for Bangor Punta to carry its BAR investment on the balance sheet at this figure, Bangor Punta had since 1965 used a carrying value of approximately $18.4 million based upon an independent market price evaluation of the BAR stock in 1965. This $18.4 million figure appeared on the balance sheet in Bangor Punta's registration statement for its Piper exchange offer, and an accompanying footnote to the balance sheet stated clearly that the BAR's carrying value was based upon the 1965 market price evaluation.* In addition, the registration statement also included complete separate financial statements for the BAR and a statement of earnings covering the five preceding years, which showed that the BAR's earnings had declined steadily from more than $1.6 million in 1965 (when the appraisal was made) to approximately $60,000 in 1968.

---

* The footnote, which also fully described certain annual accounting adjustments to the BAR's carrying value, read as follows:

"NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
(Information Relating to March 31, 1969 is Unaudited)

NOTE 1—Principles of Consolidation:

. . .

At September 30, 1965, the equity in the underlying net assets of the Railroad amounted to $29,791,456, which was

During the period in which Bangor Punta's registration statement was required to be kept effective (July 18—August 27, 1969), Bangor Punta was studying various alternative methods of possible disposition of the BAR but had reached no decision concerning whether such disposition should occur, or the form of the disposition. Subsequently, on October 2, 1969, Bangor Punta entered into an agreement to sell its BAR stock to The Amoskeag Company ("Amoskeag") for $5 million plus certain additional contingent consideration, terms which were similar to those first proposed by Amoskeag in May, 1969. As a result of such sale, Bangor Punta recognized a book loss, not a cash loss, of approximately $13 million.

On September 9, 1970, the Commission filed its complaint in this action charging that Bangor Punta's registration statement was materially misleading by failing to state that

---

$21,694,917 more than the then carrying value. Recognition of this excess was deemed appropriate but it was decided to limit the amount includible in stockholders' equity to $18,384,808 based upon a market price evaluation of the Railroad common stock. This resulted in increasing the carrying amount of the investment in the Railroad and stockholders' equity by $10,288,629. Such restated carrying amount of the investment was $11,406,648 less than the equity in underlying net assets. During the year ended September 30, 1966 the carrying amount of the investment increased by $749,983, representing the cost of 559 shares of capital stock acquired from minority holders and the equity in undistributed earnings for the year, to the amount of $19,134,791, or $11,449,312 less than the equity of $30,584,103 in the underlying net assets of the Railroad. During the year ended September 30, 1967 the carrying amount of the investment decreased by $336,488, representing the excess of dividends paid to the parent over the parent's equity in the earnings of the Railroad, to $18,798,303, or $11,451,123 less than the equity of $30,249,426 in the underlying net assets of the Railroad. During the year ended September 30, 1968 the carrying amount of the investment increased by $32,443, representing the cost of 120 shares of capital stock acquired from minority holders and the equity in undistributed earnings for the year, to the amount of $18,830,746, or $11,465,081 less than the equity of $30,295,827 in the underlying net assets of the Railroad. Separate financial statements of the Railroad are included elsewhere herein. . . ." (Exhibits in Court of Appeals, Vol. I, p. 99).

Bangor Punta had reached a decision, and made a commitment, to sell its BAR interest to Amoskeag for $5 million prior to July 18, 1969, but had intentionally deferred consummation of the transaction to avoid disclosure of the book loss in its registration statement. In addition to seeking an order requiring Bangor Punta to offer rescission to the former Piper shareholders who had accepted its exchange offer, the Commission sought injunctive relief against Bangor Punta, alleging that Bangor Punta had "demostrated a propensity for violating the securities laws" (SEC Complaint, Appendix in Court of Appeals, Vol. I, pp. 194A-200A).

In March, 1971, the action was tried before the Honorable Milton Pollack, District Judge for the Southern District of New York.*

In his opinion filed on August 25, 1971 (Jt. App. C-1-18),** Judge Pollack found that the Commission had wholly failed to prove the allegations of its complaint, *i.e.*, that Bangor Punta had reached a decision to sell the BAR and had deferred its consummation to avoid disclosure. Judge Pollack stated:

> "These contentions, as well as Dumaine's [the Commission's only witness] testimony on the subject, lack support both in the credible evidence and the probabilities. Indeed the evidence which the Court accepts as worthy of belief unequivocably negates any such purpose or plan.
>
> * * * * *

---

* The action was consolidated for trial with an action commenced by Chris-Craft Industries, Inc. ("Chris-Craft") against Bangor Punta and others (the "Chris-Craft action") and an action commenced by Bangor Punta against Chris-Craft (the "Bangor Punta action"), as all three actions related to the contest between Bangor Punta and Chris-Craft for control of Piper. There are presently pending before this Court three petitions for certiorari (Nos. 73-152, 73-153 and 73-154) filed by the defendants in the Chris-Craft action.

** "Jt. App." refers to the joint appendices filed in this Court by the petitioners in the Chris-Craft action (Nos. 73-152, 73-153 and 73-154).

> "The Court has found that as of these dates [July 18-August 27, 1969] Bangor Punta had not reached a decision to sell. The Commission's charge that the sale was a reasonable probability is made from the vantage point of hindsight. In the total perspective of events . . . the Court cannot find that the sale [of the BAR] was a reasonable probability at the time and to the people involved." (Jt. App. C-11, 13).

Although rejecting the Commission's contentions, Judge Pollack went on to rule that because of the unique appraisal nature of the $18.4 million carrying value of the BAR, Bangor Punta's registration statement was "unintentionally in error" in failing to disclose the "circumstances surrounding the negotiations for the sale of the BAR" even though a sale was not a reasonable probability at the time. (Jt. App. C-13-15, G-19).*

In so ruling, Judge Pollack stressed that Bangor Punta had acted in complete good faith, stating:

> "I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the non-disclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose." (Jt. App. C-14).

Having determined that there was an error, albeit unintentional, in Bangor Punta's registration statement, Judge Pollack ordered that Bangor Punta make an offer of rescis-

---

* The phrase "unintentionally in error" was used by Judge Pollack in his opinion in the companion Chris-Craft action to describe his holding in the instant action (Jt. App. G-19).

sion to those Piper shareholders who had accepted its exchange offer pursuant to such registration statement. However, because his ruling was expressly limited to this highly unique situation involving a carrying value based upon an appraisal and because he found that Bangor Punta had acted in good faith with no intent to mislead investors, Judge Pollack exercised his discretion to deny the Commission's request for injunctive relief. (Jt. App. C-14-16).

On appeal to the Second Circuit, Judge Pollack's decision in this action was affirmed in all material respects in an opinion dated March 16, 1973 (Jt. App. H-1-124).* With respect to his denial of the Commission's request for permanent injunctive relief, Judges Gurfein and Mansfield formed a majority in voting to affirm Judge Pollack (Jt. App. H-96-100, 117-124), and Judge Timbers dissented (Jt. App. H-78-89).

Argument

The District Court's denial of the Commission's request for permanent injunctive relief was a proper exercise of its discretion.

Contrary to the Commission's assertion in its petition herein, the decision in the instant case does not establish new and more stringent standards for the granting of injunctive relief in Commission enforcement actions.

Although the Commission recognizes the standard for the granting of injunctive relief which this Court enunciated in *United States* v. *W. T. Grant Co., supra,* that "there exists some cognizable danger of recurrent violation," it

* The Second Circuit's decision dealt not only with the instant action but with the related Chris-Craft and Bangor Punta actions. Although, in the Chris-Craft action, the Second Circuit also affirmed the District Court's determination that Bangor Punta had acquired some of its Piper shares in technical violation of Rule 10b-6, the Commission did not base its complaint on any claimed violation of Rule 10b-6 and has expressly disclaimed any reliance upon any violation of Rule 10b-6 as a basis for its claim for injunctive relief (Appendix in Court of Appeals, Vol. III, pp. 1113A-1114A).

argues that proof of a "significant violation" of the federal securities laws itself establishes a "cognizable danger of recurrent violation" requiring the issuance of an injunction "unless the defendant shows exceptional circumstances exist that would make an injunction inappropriate in the particular case."

In so contending, the Commission is attempting to eliminate the broad discretion resting with the district judge to determine whether, based on all the facts and circumstances in a particular case, a "cognizable danger of recurrent violation" does in fact exist. The district judge's discretion was expressly recognized by this Court in *Grant* when it stated:

> ". . . The chancellor's decision [whether to grant injunctive relief] is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it." 345 U.S. at 633.

As the facts detailed herein fully demonstrate, there is no basis for any claim that Judge Pollack abused his discretion by denying injunctive relief under the circumstances of the instant case. Indeed, even under the test which the Commission has proposed, the circumstances of the instant case are fully sufficient to fall within the "exceptional circumstances" which the Commission itself would recognize as a proper basis for denial of injunctive relief.

Prior to the instant case, no decided case imposed upon a corporation a duty to disclose a proposal to purchase an asset used in the operations of the company absent a decision, or at least a reasonable probability, that the asset would be sold. *Cf., List* v. *Fashion Park, Inc.*, 340 F.2d 457 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1965); *James Blackstone Memorial Library Ass'n* v. *Gulf, Mobile & Ohio R.R. Co.*, 264 F.2d 445 (7th Cir. 1959), *cert. denied*, 361 U.S. 815 (1959).

In the instant case, Judge Pollack found that during the relevant period there was neither a decision nor a reasonable

probability that the BAR would be sold (Jt. App. C-13).* His holding that Bangor Punta's registration statement was nonetheless "unintentionally in error" was expressly based upon the unusual, but entirely proper, method of reporting the carrying value of the BAR on Bangor Punta's balance sheet, *i.e.*, the use of a 1965 appraisal.** Judge Pollack stated:

> "In so holding [that Bangor Punta's registration statements was deficient] especial note is taken of the unique 'valuation' nature of the $18.4 million figure at which the BAR interest was carried on Bangor Punta's books. The present conclusion is not necessarily to be taken as applicable in cases where book carrying figures are in accordance with principles of conventional transactional accounting or where circumstances might otherwise be different." (Jt. App. C-15-16).

When the highly unique factual circumstances of the instant case are coupled with Judge Pollack's express findings of good faith and absence of any intention by Bangor Punta to mislead the public (Jt. App. C-12-14), sufficiently exceptional circumstances are presented, even under the very test suggested by the Commission, to permit the District Court to exercise its discretion to deny injunctive relief.

The Commission's petition herein not only ignores the unique factual circumstances involved in this case but attempts to attack Judge Pollack's findings of good faith by

---

* As Judge Pollack found, Bangor Punta's management, "consistent with the dictates of prudence . . . insisted on consideration and study of alternatives," including various methods of possible disposition of the BAR under which substantial tax benefits of up to $17.7 million might be obtained. (Jt. App. C-12). Indeed, the evidence showed that both Bangor Punta's Chairman of the Board, Nicolas M. Salgo, and its President, David W. Wallace, strongly opposed the sale to Amoskeag up until the eve of its consummation in October, 1969.

** Because this appraisal value was used, Judge Pollack concluded that disclosure of a proposal to purchase the BAR at a substantially lower figure was required irrespective of whether or not there was at the time a reasonable probability that the proposal would ultimately be accepted.

citing language from Judge Timbers' opinion to the effect that Bangor Punta's conduct was "unreasonable" and "reckless". These citations, however, merely serve to highlight the inherent inconsistencies in Judge Timbers' analysis, for at other places in his opinion Judge Timbers characterizes Bangor Punta's conduct as "negligence" (Jt. App. H-56) and expressly, although somewhat grudgingly, accepts all of the findings of fact made by Judge Pollack, necessarily including his findings of good faith (Jt. App. H-37, 79).

Moreover, Judge Mansfield, joined in substance by Judge Gurfein (Jt. App. H-97-98), laid to rest any possible claim that Bangor Punta acted other than in good faith, stating:

> "The dissent's description of BPC's conduct as 'most flagrant,' its characterization of the district court's action as an 'abuse of discretion,' and its portrayal of our decision as a 'mischievous precedent,' simply ignore undisputed contrary findings of fact, which are fully supported by more than ample credible evidence. Such comments sacrifice controlling evidence and governing legal principles to insatiable zeal for use of an unjustified remedy, all in the name of vigorous enforcement of federal securities laws." (Jt. App. H-117; see also Jt. App. H-117-123).

Thus, no amount of rhetoric, either in Judge Timbers' opinion or by the Commission, can change the fact that this case involves a single unintentional violation of the securities laws, arising in a quite unique factual situation, by a defendant which at all times acted in utmost good faith with no intention to mislead the public. These were Judge Pollack's findings, and they were expressly affirmed by the Second Circuit. Under such circumstances, as Judges Gurfein and Mansfield concluded, Judge Pollack's denial of the Commission's request for injunctive relief was fully within the proper exercise of his discretion. See, *e.g.*, *United States* v. *W. T. Grant Co.*, *supra*; *SEC* v. *Manor Nursing*

Centers, Inc., 458 F.2d 1082, 1100-1 (2d Cir. 1972); *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1306-7 (2d Cir. 1971); *SEC* v. *Culpepper*, 270 F.2d 241, 249-50 (2d Cir. 1959); and *SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943, 955-7 (S.D.N.Y. 1971).

Lastly, the Commission expresses fears that the statement in Judge Pollack's opinion that the Commission failed to establish that Bangor Punta had "a propensity or natural inclination to violate the securities laws" will be interpreted by other courts in a manner which will "seriously lessen the availability and hence the effectiveness of Commission injunctions as a major tool for protecting public investors against securities frauds."*

Although Judge Pollack's decision is now more than two years old, the Commission cannot point to a single decision in which it has been denied injunctive relief based upon the feared phrase in his opinion. Moreover, the majority opinions of Judges Gurfein and Mansfield on appeal make abundantly clear that this case is not to be construed in any way as changing existing standards for injunctive relief (Jt. App. H-98, 121).** Thus, the fears expressed by the Commission herein are groundless.

---

* It is ironic that the Commission now objects to the District Court's use of the word "propensity", which had its origin in this action in the complaint which the Commission filed to initiate the action. (SEC Complaint, ¶ 18, Appendix in Court of Appeals, Vol. I, p. 199A).

** Indeed, in its brief in opposition to a motion to dismiss filed by certain defendants in *SEC* v. *Allegheny Beverage Corporation* (D.D.C. Civ. No. 932-73), one of the pending actions cited in a footnote at p. 13 of the Commission's petition herein, the Commission expressly recognized that the majority opinions do not reflect any change in existing standards. The Commission stated:

> "Defendants also rely on *Securities and Exchange Commission* v. *Bangor Punta Corp.*, 331 F. Supp. 1154 (S.D.N.Y. 1971). As the defendants indicate, this case was affirmed by a majority of a panel of the Court of Appeals for the Second Circuit . . . However the majority opinion did not regard its decision as changing the standard from one of 'reasonable likelihood' to 'natural inclination and propensity'. The court stated: 'We emphasize that we are not in the least interested in limiting the basis for an SEC injunction as a matter of general rule'." (Citations omitted.)

Conclusion

For the foregoing reasons, respondent prays that the Commission's petition for a writ of certiorari be denied.

Respectfully submitted,

James V. Ryan
C. Kenneth Shank, Jr.
One Rockefeller Plaza
New York, New York 10020.
Counsel for Petitioners

Webster Sheffield Fleischmann
Hitchcock & Brookfield,
Of Counsel.

September 13, 1973.

REPLY BRIEF OF PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-306

SECURITIES AND EXCHANGE COMMISSION,
PETITIONER

v.

BANGOR PUNTA CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

Respondent emphasizes (Br. in Opp., pp. 1, 5) the finding of the district court that Bangor Punta acted in complete good faith with no intent to violate the securities laws and states that that court's decision was affirmed by the court of appeals in all material respects (Br. in Opp., p. 6). The court of appeals, however, did not affirm that finding. To the contrary, in the portion of its opinion dealing with the claims of Chris-Craft against Bangor Punta, as to which that court was unanimous, it stated (J. App. H47-H48):

> We believe that the officers of BPC [Bangor Punta] greatly transgressed their allowable area of discretion in not disclosing the BAR [Bangor and Aroostock Railroad] negotiations and other circumstances reflecting the value of the BAR. The officials

> in charge of the exchange offer were well aware of the discussions with Amoskeag and the activities of the special BAR committee. They also were aware of all the other circumstances that indicated that the book value of the BAR was deceptive and unrealistic. Their judgment not to reveal basic information about the then current status of the BAR holdings clearly was unreasonable. They showed reckless disregard for the import of their activities concerning the BAR. They knew that the book value of the BAR set forth in the registration statement was no longer realistic. Considering the totality of the facts and circumstances, they failed to discharge their clear duty of proper disclosure.

Respondent also states (Br. in Opp., p. 9) that Bangor Punta's violation was a "single unintentional violation" in which it acted in "utmost good faith with no intention to mislead the public." The foregoing statement of the court of appeals refutes that claim, which also is inconsistent with the fact that three days before this violation Bangor Punta had consented to an injunction against other securities law violations in connection with the same proxy contest (Pet. 3-4). It was in the light of that earlier injunction that the Commission alleged in its complaint that Bangor Punta had a "propensity for violating the securities laws." Respondent suggests (Br. in Opp., p. 10 n. *) that this allegation indicated that the Commission assumed that such a "propensity" was a prerequisite to an injunction. In fact, however, that "propensity" highlighted the need for an injunction and demonstrated that it should be broad enough to protect the public against different types of violation.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,
Securities and Exchange Commission.

SEPTEMBER 1973.